INDEX

	PAGE
Opinions below	1
Statement	1
Argument	2
(1) Marchetti and Grosso should be retroactively applied at least to criminal convictions for violation of the wagering tax scheme	2
(2) There is no legitimate issue of waiver in this cause	5
Conclusion	13

Cases

Alexander v. United States, 290 F.2d 252 8

Barber v. Page, 390 U.S. 719 6
Brady v. United States, 397 U.S. 742 ..... 9, 10, 11

California v. Taylor, 353 U.S. 553 5
Cotner v. Henry, 394 F.2d 873 9
Curtis Publishing Company v. Butts, 388 U.S. 130 ..... 11, 12

Dean v. United States, 392 F.2d 672 2
Dunigan v. United States, 274 U.S. 195 5

Graham v. United States, 407 F.2d 1313 ..... 3, 4
Grosso v. United States, 390 U.S. 62 ..... 2, 3, 4, 5, 6, 7, 9, 11, 12

Halliday v. United States, 394 U.S. 831 ..... 3, 4, 5
Haynes v. United States, 390 U.S. 85 ..... 4, 6, 8, 9
Husty v. United States, 282 U.S. 694 5

In re Williams, 460 P.2d 984 10

Lawn v. United States, 355 U.S. 339 5
Leary v. United States, 395 U.S. 6 ..... 4, 6
Lewis v. United States, 348 U.S. 419 ..... 6, 12

Mackey v. United States, 411 F.2d 504 ..... 2, 3
Marchetti v. United States, 390 U.S. 39 ..... 2, 3, 4, 5, 6, 7, 9, 11, 12
Meadows v. United States, 420 F.2d 795 9

New York Times v. Sullivan, 376 U.S. 254 11

Stovall v. Denno, 388 U.S. 293 3

United States v. Brierley, 300 F. Supp. 638 11
United States v. Doyle, 348 F.2d 715 8
United States v. Jackson, 390 U.S. 570 ..... 9, 10
United States v. Kahriger, 345 U.S. 22 ..... 6, 12
United States v. Michael, ... F.2d ...., 7 Crim. L. Rptr. 2155 8

PAGE

United States v. Miller, 406 F.2d 1100 9
United States v. Sisson, 90 Sup. Ct. 2117 7
United States v. United States Coin and Currency, 393 F.2d 499 2
Washington v. United States, 402 F.2d 3 2

Constitution and Statutes

Constitution of the United States
Fifth Amendment 2, 3, 7, 8, 9
Seventh Amendment 9
26 U.S.C. § 7201 1

Miscellaneous

Brief of Joseph P. Lucia as Amicus Curiae, United States v. United States Coin and Currency, *cert. granted*, 393 U.S. 949, *restored for reargument*, 395 U.S. 918 ..... 2, 3
Brief for Petitioner, Marchetti v. United States, 390 U.S. 39 7
Fed. R. Crim P. Rule 34 7
Supplemental Brief for Appellee, Lucia v. United States, 416 F.2d 920 (5th Cir.), *aff'd on reh. en banc*, 423 F.2d 679, p. 3 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 186

UNITED STATES OF AMERICA,
Petitioner,

v.

JOSEPH P. LUCIA,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The *per curiam* opinion of the court of appeals sitting *en banc* is reported at 423 F.2d 679. The opinion of the panel, which it affirmed, is reported at 416 F.2d 920.

STATEMENT

Respondent received a five-year, rather than a five-month, probated sentence for violation of 26 U.S.C. § 7201. He completed his five-year probationary period and was discharged from probation on July 5, 1970. He had previously served his six-month jail sentence and paid his fines

of $20,000. With the exception indicated, respondent accepts petitioner's statement.

ARGUMENT

(1) Marchetti and Grosso Should Be Retroactively Applied at Least to Criminal Convictions for Violation of the Wagering Tax Scheme

This Court's decisions in *Marchetti* v. *United States,* 390 U.S. 39 (1968), and *Grosso* v. *United States,* 390 U.S. 62 (1968), raise questions of complexity as to the manner in which the Fifth Amendment defense there recognized should be applied in civil forfeiture cases;[1] civil wagering tax cases;[2] and non-wagering tax cases such as income tax fraud proceedings.[3] Petitioner has recognized that these causes entail different considerations from criminal convictions under the wagering tax scheme.[4] Cases are pending before the Court that provide adequate vehicles for the Court to resolve these problems.

This case, however, involves only the relatively narrow problem whether criminal convictions, admittedly obtained

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[1] United States v. United States Coin and Currency, 393 F.2d 499 (7th Cir.), *cert. granted,* 393 U.S. 949 (1968), *restored for reargument,* 395 U.S. 918 (1969) (No. 8, 1969 Term; renumbered No. 5, 1970 Term); Dean v. United States, 392 F.2d 672 (6th Cir. 1968), *petition for cert. filed,* 37 U.S.L.W. 3139 (U.S. Oct. 8, 1968) (No. 619, 1968 Term; renumbered No. 12, 1969 Term; renumbered No. 8, 1970 Term).

[2] Washington v. United States, 402 F.2d 3 (4th Cir. 1968), *petition for cert. filed,* 37 U.S.L.W. 3221 (U.S. Dec. 13, 1968) (No. 831, 1968 Term; renumbered No. 22, 1969 Term; renumbered No. 11, 1970 Term).

[3] Mackey v. United States, 411 F.2d 504 (7th Cir.), *cert. granted,* 396 U.S. 954 (1969) (No. 529, 1969 Term; renumbered No. 36, 1970 Term).

[4] Brief for Petitioner at 29-30, United States v. United States Coin and Currency, *supra.*

in derogation of the Fifth Amendment rights recognized in *Marchetti* and *Grosso*, should be allowed to stand because they were obtained before the decisions in *Marchetti* and *Grosso* were handed down. We submit that the 13 judges of the United States Court of Appeals for the Fifth Circuit scrupulously and persuasively followed the criteria annuciated by this Court for determining retroactivity. *Stovall* v. *Denno*, 388 U.S. 293 (1967); *Halliday* v. *United States*, 394 U.S. 831, 832 (1969). We have sought to demonstrate the correctness of the Fifth Circuit's ruling on retroactivity in the Brief of Joseph P. Lucia as *Amicus Curiae*, *United States* v. *United States Coin and Currency*, *cert. granted*, 393 U.S. 949 (1968), *restored for reargument*, 395 U.S. 918 (1969) (No. 8, 1969 Term; renumbered No. 5, 1970 Term), and respectfully refer the Court to that brief.

The Sixth Circuit opinion in *Graham* v. *United States*, 407 F.2d 1313 (6th Cir. 1969), *petition for cert. filed*, (May 17, 1969) (No. 294 Misc., 1969 Term; renumbered No. 5040, 1970 Term), does not survive comparison. The Sixth Circuit justifies its result in a single sentence that states in a wholly conclusory form that the three criteria held critical by this Court point toward prospective application.

Mackey v. *United States*, 411 F.2d 504 (7th Cir.), *cert. granted*, 396 U.S. 954 (1969) (No. 529, 1969 Term; renumbered No. 36, 1970 Term), cannot fairly be said to conflict with *Lucia*. There was no charge of violation of the wagering tax scheme, but rather of evasion of income taxes. 411 F.2d at 509. The Seventh Circuit specifically disavowed any intent to decide the question of retroactive application to criminal wagering tax violations:

> Whether the ruling of *Marchetti* and *Grosso* should be applied retroactively to defendants in the situation of Kahriger and Lewis themselves [citation omitted], who have claimed the privilege and have been convicted

> of failure to file the returns, presents considerations not before us, since in such cases recognition of the privilege would negate the very offense for which the defendants are imprisoned.

Id. at 509.

Petitioner seems to argue that the question of the retroactive application of *Marchetti* and *Grosso* is the same as the question of the retroactive application of *Haynes* v. *United States,* 390 U.S. 85 (1968) (possession of unregistered firearms) and the retroactive application of *Leary* v. *United States,* 395 U.S. 6 (1969) (purchasing marihuana without an order form). If so, petitioner distorts this Court's three-fold test of retroactivity for newly adopted constitutional rulings, recently reiterated in *Halliday,* which requires consideration of: "(1) the purpose of the new rule; (2) the extent of reliance upon the old rule; and (3) the effect retroactive application would have upon the administration of justice." *Halliday* v. *United States,* 394 U.S. at 832.

While concededly the purpose of the rule in *Marchetti-Grosso, Haynes* and *Leary* is the same, this is no indication that the application of the second and third criteria would give the same result. It is quite conceivable that, although *Marchetti-Grosso* should be applied retroactively, either *Haynes* or *Leary* or both should not. Thus a conflict in the circuits over the retroactivity of *Haynes* and *Leary* is no basis for granting the writ in this cause and it is not necessary, or appropriate, to consider the retroactivity of *Marchetti-Grosso, Haynes* and *Leary* as a unitary question.

We suggest, therefore, that the limited question involved in *Lucia* and *Graham* does not merit plenary consideration by the Court. Certiorari should be denied in *Lucia,* and *Graham* should be summarily reversed.

(2) There Is No Legitimate Issue of Waiver in This Cause

Petitioner now regards the issue of waiver as an "additional question" to that of retroactivity and disagrees with what it assumes to have been the view of the Fifth Circuit, sitting *en banc*, that if *Marchetti* and *Grosso* are given full retroactive effect, there is no argument for failing to give relief to a person who pleaded guilty before they were decided. (Petition, p. 6 n.3.) This has not always been the view of petitioner. Although it succeeded in the district court on the basis of waiver, and at one time argued waiver to the Fifth Circuit, in its presentation to the *en banc* court petitioner was at pains to say that the question of retroactivity was "the controlling question" (Appellee's Supplemental Brief, p. 3) and that:

> the question of retroactivity should be considered—and decided—upon the basis of policy questions which the concept of waiver will tend not to illuminate but to obscure.

Id. at 4. Thus petitioner now seeks to win reversal of the Fifth Circuit on the basis of an argument it told the court below it ought not to consider.[5]

The sound perception was that advanced by petitioner in the court below, rather than the one it puts forward here. The impact on past judgments of changes in the law should be squarely confronted in terms of the three-fold test of retroactivity reiterated in *Halliday*.

To hold that the new rules are retroactive, but that one who pleaded guilty when the rules were different has waived them, would obscure rather than illuminate the policy considerations that are properly applicable to an issue of that kind. It would undermine the clear-cut test that there must

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[5] *Cf.* Dunigan v. United States, 274 U.S. 195, 200 (1927); Husty v. United States, 282 U.S. 694, 701-702 (1931); California v. Taylor, 353 U.S. 553, 557 n.2 (1957); Lawn v. United States, 355 U.S. 339, 362 n.16 (1958).

have been an "intentional relinquishment or abandonment of a known right," *Barber* v. *Page,* 390 U.S. 719, 725 (1968), by fictive talk about waiver of a right that could not have been known so long as *Kahriger*[6] and *Lewis*[7] stood. And it would lead to the anomaly that one who conceded that, under the law as it then stood, he was guilty would get no benefit from the retroactive rule, while one who denied his guilt, though he was found to have been guilty, would now be entitled to have his conviction expunged. Surely constitutional rights, satisfying all other requisites for retroactive application, do not turn on such an arbitrary touchstone.

Nor is the argument for separate consideration of waiver advanced by pointing out that a plea of guilty waives, among other things, the privilege against compulsory self-incrimination. Respondent's plea was an intentional and knowing relinquishment of his constitutional privilege not to be convicted out of his own mouth. It was not a waiver of his privilege not to incriminate himself of a variety of offenses by paying the tax on wagers:

> The aspect of the self-incrimination privilege which was involved in *Marchetti,* and which petitioner asserts here, is not the undoubted right of an accused to remain silent at trial. It is instead the right not to be criminally liable for one's previous failure to obey a statute which required an incriminatory act. . . . His admission at trial that he had indeed failed to comply with the statute was perfectly consistent with the claim that that omission was excused by the privilege. Hence, it could not amount to a waiver of that claim.

Leary v. *United States,* 395 U.S. 6, 28 (1969).

Between them, *Marchetti, Grosso* and *Haynes* seem dispositive of petitioner's argument that Mr. Lucia's plea of

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[6] United States v. Kahriger, 345 U.S. 22 (1953).
[7] Lewis v. United States, 348 U.S. 419 (1955).

guilty amounts to a waiver depriving him of the benefit of *Marchetti* and *Grosso.*

In *Marchetti,* the constitutional objection was raised for the first time on a motion to arrest judgment. 390 U.S. at 41-42. *See also* Brief for Petitioner, *Marchetti* v. *United States,* (No. 38, 1966 Term; renumbered No. 2, 1967 Term), p. 3. The relief to which this Court held that Marchetti was entitled was available only "if the indictment or information does not charge an offense or if the court was without jurisdiction of the offense charged." Rule 34, Fed. R. Crim. P. Thus, *Marchetti* itself stands for the proposition that the Fifth Amendment defense it recognized does not fall, as petitioner suggests, into the category of non-jurisdictional defenses inevitably waived by entry of a guilty plea or by failure to assert at trial. *Compare United States* v. *Sisson,* 90 Sup. Ct. 2117 (1970) (illustrating the narrowness of the category of defenses properly raised in arrest of judgment).

In *Grosso,* no objection was raised to the counts of the indictment based on failure to pay the occupational tax. Indeed, at the first oral argument of the *Grosso* case, Justice Stewart asked counsel for Grosso why he was not challenging the occupational tax counts and was told that the record would not permit such a challenge since the objection had not been made below. Nevertheless, this Court ordered Grosso's conviction reversed on the occupational tax counts, as well as the excise tax counts, saying:

> Given the decisions of this court in *Kahriger* and *Lewis, supra,* which were on the books at the time of petitioner's trial, and left untouched by *Albertson* v. *SACB, supra,* we are unable to view his failure to present this issue as an effective waiver of the constitutional privilege.

390 U.S. at 71.

In *Haynes* the defendant had entered a plea of guilty after the trial court denied a motion to dismiss based on the claim on the statute under which he was charged was "unconstitutional." In spite of the guilty plea, the court did not find it necessary to deal with the issue of waiver in the text of its opinion, relegating resolution of the question to the following footnote:

> Petitioner's plea of guilty did not, of course, waive his previous claim of the constitutional privilege. See, *e.g., United States* v. *Ury,* 106 F.2d 28.

390 U.S. at 87 n.2.

Haynes is simply incompatible with the petitioner's position that respondent's pleas of guilty constituted a waiver of his Fifth Amendment defense. Petitioner may not soften the effect of *Haynes* by pointing out the prior assertion by the defendant of the "unconstitutionality" of the statute involved in that case. Such a factual distinction requires the illogical assertion that a defense, once raised, is not waived by a guilty plea, while that which has not been raised is thereby waived. Such a distinction is logically fantastic; it is also foreclosed by the case law. Ordinarily, a defendant who unsuccessfully asserts a defense by pre-trial motion, and then pleads guilty, has waived that defense. *E.g., United States* v. *Doyle,* 348 F.2d 715 (2d Cir. 1965) (statute of limitations); *Alexander* v. *United States,* 290 F.2d 252 (5th Cir.), *cert. denied,* 368 U. S. 891 (1961) (illegal seizure). That principle is, however, properly applicable only where the defense is known. It could not properly be applied in *Haynes* because the defense was unknown, and the plea could not have been considered a voluntary waiver. *See United States* v. *Michael,* ..... F.2d ....., 7 Crim L. Rptr. 2155 (7th Cir. 1970); *Meadows* v. *United States,* 420 F.2d 795 (9th Cir. 1969),

petition for cert. filed, 38 U.S.L.W. 3341 (U.S. Feb. 20, 1970) (No. 1217, 1969 Term; renumbered No. 94, 1970 Term); *United States* v. *Miller,* 406 F.2d 1100 (4th Cir. 1969). *See also Cotner* v. *Henry,* 394 F.2d 873 (7th Cir.), *cert. denied,* 393 U.S. 847 (1968).

Marchetti did not waive his constitutional defense by failure to raise it until after conviction. Grosso did not waive his constitutional defense by failure to assert it at any time. Haynes did not waive his constitutional defense by pleading guilty. Only on an unsound theory that the whole is greater than the sum of the parts can it be held that a defendant waives a constitutional defense not then known to exist if he both fails to assert it and pleads guilty.

No authority cited or discussed by petitioner can overcome the controlling effect of *Marchetti, Grosso* and *Haynes* and support a finding of waiver in this cause. The decision in *Brady* v. *United States,* 397 U.S. 742 (1970), turned upon considerations entirely different from those relevant to a determination of waiver in the instant case. In *Brady,* the petitioner claimed his guilty plea was involuntary because of three factors: impermissible pressure of counsel; improper promises with respect to reduction of sentence and clemency; and fear of the death penalty if he exercised his right to a jury trial.

Subsequent to Brady's conviction, this Court ruled in *United States* v. *Jackson,* 390 U.S. 570 (1968), that a provision of the law under which defendant was convicted, which allowed imposition of the death penalty only by jury, imposed an unconstitutional restraint upon the exercise of the Seventh Amendment right to jury trial and the Fifth Amendment right not to plead guilty. Although the *Jackson* decision was obviously the catalytic force behind Brady's collateral attack upon his conviction, its application was not

the sole factor in determining the success of his efforts. The discussion of the Court clearly indicates that the death penalty possibility was only one factor that the defendant had to, and must have, weighed at the time he pleaded guilty. As the Court stated:

> The voluntariness of Brady's plea can be determined only by considering all of the relevant circumstances surrounding it.

397 U.S. at 749.

If Brady had raised the constitutional argument that later proved successful in *Jackson,* his basic dilemma whether to plead guilty would have remained the same, with the one exception that the possibility of imposition of the death penalty would have been removed from among the considerations relevant to his decision. If Brady had not pleaded guilty and had successfully raised the *Jackson* defense, he would still have faced the dangers of prosecution and conviction.

This must be contrasted with Mr. Lucia's situation. Respondent does not request this Court to disregard "his solemn admissions in open court" simply because it now appears that the Government would have a "weaker case than [he] . . . had thought or that the maximum penalty then assumed applicable has been held inapplicable in subsequent judicial decisions." 397 U.S. at 757. We are not concerned here with a weaker case or a different maximum penalty. We are concerned with the right to assert a complete bar to prosecution. No attorney, without commiting an act of malpractice, could intelligently waive such a defense. *See In re Williams,* 460 P.2d 984, 81 Cal. Rptr. 784 (Cal. 1969) (holding counsel constitutionally inadequate where he failed to raise a defense which would have barred prosecution for a particular statutory offense, but

instead permitted his client to plead guilty). *See also United States* v. *Brierley,* 300 F. Supp. 638 (E.D. Pa. 1969). Thus, while it is quite appropriate to consider waiver in a case such as *Brady* where retroactive application of a new constitutional rule alters one factor in a cluster to be considered in determining whether to plead guilty, it is entirely inappropriate where the new constitutional rule provides a complete bar to the offense in question. A finding that Mr. Lucia had intelligently waived the constitutional defense recognized by *Marchetti* and *Grosso* would obviously be a pure, and highly unworthy, legal fiction.

This Court has also recognized in civil cases the inappropriateness of using the doctrine of waiver as an impediment to the retroactive application of complete defense. In defending the civil libel action of *Curtis Publishing Company* v. *Butts,* 388 U.S. 130 (1967), Curtis failed to raise the constitutional defense that was subsequently deemed controlling in *New York Times* v. *Sullivan,* 376 U.S. 254 (1965). Following a verdict unfavorable to *Curtis,* this Court handed down its decision in the *New York Times* case. Curtis promptly filed a motion for new trial based upon an application of the constitutional defense recognized for the first time in that case. This motion was denied by the trial court and the Fifth Circuit affirmed. 351 F.2d 702 (5th Cir. 1965).

This Court disagreed, however, with the Fifth Circuit's holding of waiver, stating:

> As our dispositions of *Rosenblatt* v. *Baer,* 383 U.S. 75, and other cases involving constitutional questions indicate, the mere failure to interpose such a defense prior to the announcement of a decision which might support it cannot prevent a litigant from later invoking such a ground. Of course it is equally clear that even constitutional objections may be waived by a failure to raise them at a proper time. *Michael* v.

> *Louisiana,* [350 U.S. 91], at 99, but an effective waiver must, as was said in *Johnson* v. *Zerbst,* 304 U.S. 458, 464, be one of a "known right or privilege."
>
> * * *
>
> We would not hold that Curtis waived a "known right" before it was aware of the *New York Times* decision. It is agreed that Curtis' presentation of the constitutional issue after our decision in *New York Times* was prompt.

388 U. S. at 142-43, 144-45. Surely the proper administration of justice does not permit criminal defendants to be deemed to have waived a constitutional defense in circumstances in which waiver would not be found in civil litigation.

Any attempt to rely upon a notion of "untimeliness" as distinct from waiver is misplaced (Petition, p. 7). Respondent raised his constitutional defense by seeking collateral relief in the district court two weeks after this Court in *Marchetti* and *Grosso* overruled the *Kahriger* and *Lewis* decisions (Petition, p. 3). Here, as in *Curtis Publishing Company* v. *Butts,* respondent's "presentation of the constitutional issue [after the decisions in *Marchetti* and *Grosso*] was prompt." 388 U.S. at 145.

CONCLUSION

For all of the foregoing reasons, respondent submits that the decision of the court below was correct and that petitioner's request for a writ of certiorari should be denied.

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